

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1183

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In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

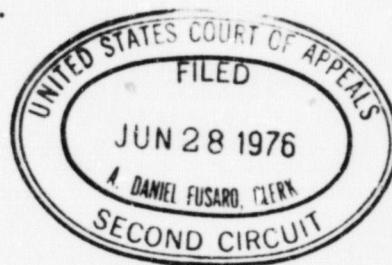
VS

RONALD WILLIAM HARVEY,

Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT
OF NEW YORK, CR. 1975-159.

BRIEF FOR THE APPELLANT



Anne M. Srebro
Latona, Worthington, Srebro
& Nitterauer
Attorneys for Appellant
Office and P.O. Address
120 Delaware Avenue
Suite 200
Buffalo, New York 14202

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BRIEF FOR THE APPELLANT

Preliminary Statement

Defendant RONALD WILLIAM HARVEY appeals from a judgment of conviction rendered on December 17, 1975, after a jury trial held before the Honorable John T. Curtin, United States District Court Judge for the Western District of New York. Appellant was convicted on both counts of a two-count Indictment. Count I charged appellant with bank robbery, in

violation of Title 18 United States Code, Section 2113(a). Count II charged appellant with bank larceny in violation of Title 18, United States Code, Section 2113(b). On January 9, 1976, Judge Curtin sentenced appellant to six years imprisonment on each of the two counts, sentence to be served concurrently. Defendant filed a timely appeal.

QUESTION PRESENTED

Did the trial court erroneously exclude independent evidence that the chief prosecution witness accused appellant of fathering, and then abandoning, her child?

STATEMENT OF FACTS

On the afternoon of April 22, 1975, Mrs. Florida Strickland, a teller at the Main-High branch of the Marine Midland Bank-Western, was robbed by a man dressed as a woman. See Transcript of Trial Record (hereinafter designated as Tr.) p.54. Mrs. Strickland described the robber as a medium complexioned black male in his early twenties, 5'11" to 6' in height, 160 lbs., slender build with broad shoulders, 5 o'clock shadow and a prominent Adam's apple, (Tr. p. 55, pp. 71-72, p.88). According to Mrs. Strickland,

the robber was wearing a straight-haired wig pulled back into a bun, a blue denim hat, which did not obstruct a full view of the robber's face, gold wire framed dark glasses, lipstick, rouge, a dark coat, and was carrying a 10" wide red print cloth shoulder bag, (Tr. p. 55, p. 66, p. 70, p. 72, p. 77, p. 86).

Mrs. Strickland was not able to identify the robber, (Tr. p. 58). The sole identification witness at the trial was a Priscilla Martin. Mrs. Martin testified that on the afternoon of April 22, while riding a bus, she observed a man she identified as appellant, walk down the steps of the Salvation Army and touch one of the two doors of the Main-High branch of the Marine Midland Bank, (Tr. p. 95, p. 100). Mrs. Martin described this man's hair style as a frizzled bush, "not flat", "an afro", and which was not a wig, and stated that he was wearing a black floppy hat whose brim obstructed a view of his face from the nose up and that he was not wearing glasses. She did not recall any lipstick, but did recall rouge. She described the man as wearing red pants, a black coat, black platform shoes and carrying a black Samsonite bag, (Tr. pp. 95-96, pp. 113-114, pp. 127-129).

On the six o'clock news on television that evening, Mrs. Martin testified that she learned that the Main-High branch of the Marine Midland was robbed by a man dressed as a woman, (Tr. p. 101, pp. 134-135, p. 137). A week and one-half later, Mrs. Martin telephoned the Main-High branch of the

Marine Midland Bank to find out the time of the bank robbery, without leaving her name or revealing any information about the robbery, (Tr. p. 138). Mrs. Martin later spoke with the Federal Bureau of Investigation about the robbery. The FBI learned of Mrs. Martin's involvement through a friend of Mrs. Martin's husband, (Tr. p. 139).

Mrs. Martin testified that she knew the appellant for some nineteen years and at one time had lived in the same house with him, (Tr. p. 94, p. 102). On cross-examination, defense counsel questioned Mrs. Martin on whether she had ever had any trouble with appellant or ever had any arguments or disagreements with him and specifically whether she ever accused appellant of fathering her child and then failing to support this child, (Tr. pp. 140-142). Mrs. Martin denied these charges and further denied that appellant visited her in the hospital after birth of the child. Mrs. Martin also denied that she confided in appellant's mother, Mrs. Catherine Harvey, that appellant was the father of the child or that she stated that she would "take revenge" on appellant for not "owning up" to this child, (Tr. pp. 142-144).

At the commencement of the defense case, the defense attorney made the following offer of proof: Mrs. Catherine Harvey, appellant's mother, was prepared to take the stand and testify that she was a longtime acquaintance of Mrs. Priscilla Martin, and that while on duty as a nurse at

Emergency Hospital in Buffalo, New York, Mrs. Martin was admitted with a broken leg. At the time of the admission, Mrs. Martin accused appellant of fathering a child and refusing to support it and further stated to Mrs. Harvey that when her husband learned that appellant had fathered this child, he seriously beat her and broke her leg, thus, necessitating this hospital admission, (Tr. pp. 155-157). The trial Judge determined that Mrs. Harvey's proffered testimony was "collateral" and that appellant would not be permitted to call Mrs. Catherine Harvey to the stand, under his reading of Federal Rule of Evidence 613(b), (Tr. pp. 163-168, Appendix for the Appellant, pp. A-23 - A-28).

ARGUMENT

EVIDENCE OF THE CHIEF PROSECUTION WITNESS' BIAS
AGAINST DEFENDANT WAS IMPROPERLY EXCLUDED

Appellant's defense at his bank robbery trial was succinctly stated by defense counsel in the opening statement: the Government has "the wrong guy", (Tr. p.16). Although the prosecution produced six witnesses, only one witness, a Mrs. Priscilla Martin, identified appellant as the culprit. The victim teller, Mrs. Florida Strickland, gave an extremely detailed description of the bank robber, but was unable to identify appellant or anyone else. Thus, the sole issue before the jury was whether or not appellant was the bank robber; or, in other words, identity. The case, therefore, rose or fell upon the testimony of Mrs. Priscilla Martin.

In the cross-examination of Mrs. Martin, defense counsel attempted to elicit from Mrs. Martin facts which would tend to demonstrate that Mrs. Martin was biased against appellant and to establish that she had a motive to testify falsely. The defense counsel asked Mrs. Martin whether she had any trouble with appellant. Mrs. Martin denied that they had any trouble as adults but she did admit that they had had some trouble when they were children. It appeared earlier in the testimony that Mrs. Martin and appellant had known each other for some nineteen years and at one time had lived in the same house. The defense counsel cross-examined Mrs. Martin on whether she ever accused

appellant of fathering her child. Mrs. Martin was given an opportunity and did deny this. The defense counsel asked whether she ever stated that she would "take revenge" on appellant for not "owning up" to this child. Again, Mrs. Martin was given the opportunity and did deny this. Mrs. Martin was asked whether or not appellant visited her in the hospital after birth of the child in question. Mrs. Martin denied this as well. Mrs. Martin was asked whether she had confided in appellant's mother, Mrs. Catherine Harvey, that appellant was the father of her child. Again, Mrs. Martin denied this, (Tr. pp.140-144).

At the commencement of the defense case, the appellant sought to contradict Mrs. Martin's answers on cross-examination by offering the testimony of Mrs. Catherine Harvey, appellant's mother. This offer was made and is preserved in the trial record pursuant to Federal Rule of Evidence 103. The court refused to permit Mrs. Catherine Harvey to testify and, as best as can be gathered from the trial transcript, apparently excluded Mrs. Harvey's testimony on the ground that her testimony was "collateral" and was in violation of Federal Rule of Evidence 613(b).

The testimony that appellant sought to place before the jury went a long way toward demonstrating that the chief prosecution witness, Mrs. Priscilla Martin, was willing to lie to the jury to be revenged upon appellant for fathering and then

abandoning her child and that she desired revenge to satisfy her feelings of disappointment, anger, hurt and embarrassment at being placed in the position of having given birth to appellant's child and having been beaten by her husband when he learned of this. Thus, it is quite clear that what appellant was seeking to prove by Mrs. Catherine Harvey's testimony was the bias of Mrs. Martin. It has long been held that bias is never a collateral matter and that it is always proper for defense counsel to demonstrate the bias of a prosecution witness.

United States v. Battaglia 394 F.2d 304 (7th Cir., 1968); Wynn v. United States 397 F.2d 621 (D.C. Cir., 1967).

In the case at bar, if Mrs. Catherine Harvey was allowed to testify and if her testimony was believed by the jury, there would undoubtedly be a reasonable doubt in their minds as to the veracity of Mrs. Martin's facile identification of appellant. There are three cases that have come before this Circuit in which this issue has been presented to the Court and in each case the Court has held that the trial court's exclusion of testimony of the witness' bias is reversible error. In United States v. Haggett 438 F.2d 396 (2nd Cir., 1971), certiorari den 402 U.S. 946, 91 S Ct 1638 29 L Ed 2d 115 (1971) the Second Circuit held that it was error to exclude independent evidence that a prosecution witness attempted to suborn perjury. In that case, the appellant was a former bank officer who was convicted of misapplying certain bank funds. The chief witness for the prosecution

at the trial was a certain Vice-President of the bank in question. On cross-examination, the defense counse^l attempted to demonstrate that the witness had attempted to suborⁿ perjury of three witnesses. Specifically, the defense attorney asked the Vice-President if he told these three witnesses to come to court and state that the appellant demanded money from them before they could obtain loans from the bank. In return for the perjured testimony, the Vice-President allegedly promised these three witnesses favorable treatment from the bank in connection with their outstanding loan balances. The Vice-President was given an opportunity and denied these allegations on cross-examination. The defense then attempted to produce the three witnesses who would testify as indicated. The trial Judge refused to allow these witnesses to testify. The Second Circuit disagreed with this result and reversed the conviction. The Second Circuit found that what the defense was attempting to demonstrate in his cross-examination of the bank Vice-President and in his proffering of the three witnesses was that the Vice-President was biased against the defendant to the point that he was willing to manufacture evidence in order to assure that appellant would be convicted. Clearly, this was a case where if the three witnesses were believed, the jury would almost certainly vote to acquit. In reaching this result, the Second Circuit quoted Judge Medina's opinion in another case, United States v. Lester 248 F.2d 329 (2nd Cir., 1957). In that case, the appellant was convicted of

perjury. The charged perjury was that the appellant had testified in a civil suit that he saw one Goldstein sign a certain contract. Goldstein, who was the Government's chief witness, said that he did not sign this contract. The defense counsel attempted on cross-examination of Goldstein to show that at the time of the alleged signing of the contract, there were certain government price regulations in effect, such to make the contract illegal. The Second Circuit reversed appellant's conviction and found that the cross-examination of the defendant was severely limited and on this point stated in an opinion by Judge Medina:

"As we view the matter, appellant was clearly entitled to prove out of Goldstein's own mouth that in December, 1952, to Goldstein's knowledge, Government price regulations were in force forbidding the sale of nickel at more than 76 cents a pound, and, if Goldstein categorically denied the existence of such Government price regulations, to prove by the regulations themselves and by a witness in charge of their enforcement that such regulations were in effect, from which the inference would have been inescapable that if, contrary to Goldstein's testimony and in accordance with the testimony of appellant which is alleged to constitute perjury, the contract was signed by Goldstein, it would have been illegal. (p.333)

It is interesting to note here that while the defendant counsel in Lester did not attempt to put on independent evidence, as was the case in Haggett and in the case at bar, Judge Medina anticipated the situation when he stated, as underlined above, that if the witness categorically denied what defense counsel was

attempting to show on cross-examination, that defense counsel would then be entitled to prove by independent witnesses that the witnesses' denials were false. So, also, in the case at bar, once Mrs. Martin denied the allegations of bias, the defense should have been allowed to put on independent evidence to demonstrate such bias, which is clearly not a collateral matter.

As Judge Medina stated on this point in United States v. Lester:

"Although a party may not cross-examine a witness on collateral matters in order to show that he is generally unworthy of belief and may not introduce extrinsic evidence for that purpose (other than records of certain convictions) 3 Wigmore, Evidence §977 et seq., a party is not so limited in showing that the witness had a motive to falsify the testimony he has given. Thus, facts may be shown from which it might be concluded that the witness favors the party for whom he has testified, as where a defense witness is shown to have lived with the defendant and borne him two children, People v. Payton, 36 Cal. App. 2d 41, 96 P. 2d 991; facts may be shown which may indicate that the witness is hostile to a party, as where, in a prosecution for attempting to bribe a police officer, the defendant was permitted to bring out that the officer had threatened to "get even" after the defendant had thrashed him following a charge by the defendant's wife that the officer had raped her, Greatreaks v. United States, 9 Cir., 211 F2d 674; it is permissible to show that the witness is financially interested in the outcome of the litigation, as where the witness may be required to indemnify the defendant, Southern Ry. Co. v. Bunnell, 138 Ala. 247, 36 So. 380; it may be shown that the witness is under indictment for the acts he has denied in his testimony, Terminal Transport Co. v. Foster, 5 Cir.,

164 F2d 248; and it is permissible to show that contrary testimony would subject the witness to criticism by his superiors, Atlantic Coast Line R. Co. v. Dixon, 5 Cir., 207 F2d 899, 904. (p.334) (here)...if Goldstein did sign the contract as appellant said he did and if it was for an illegal purchase and sale of nickel in violation of the Government price regulations then in force, Goldstein would have a powerful motive to deny he ever signed the contract or was a party to any such transaction. This is what appellant was trying to prove, and the evidence should have been received. (p.335)

In another OPA case, United States v. Beekman 155 F.2d 580 (2nd Cir., 1946) appellant was convicted of selling meat at prices in excess of the government regulated price. Four witnesses testified for the prosecution at the trial. The defense counsel subpoenaed the OPA records of four government witnesses. The trial court quashed the subpoena on a ground that these records were collateral. This is the same ground that Judge Curtin denied appellant's proffered testimony of Mrs. Catherine Harvey. The Second Circuit reversed on this point and stated an opinion by Judge Frank as follows:

"It needs no lively imagination to perceive that persons who have been disciplined by such a government agency, and who are still in business subject to its supervision, might be facile witnesses against other alleged offenders. Consequently, records which show that they had thus been disciplined bear importantly on their bias. It follows that such evidence is admissible, not "collateral". Wigmore, Evidence §§1020, 1022. (p.584)

Thus, it is seen from the above cases that the bias of a witness is not collateral and that the defense has a right to put on independent evidence to demonstrate that the prosecution witness is biased. The trial Judge in denying defendant's proffered testimony stated that he was relying upon Federal Rule of Evidence 613(b). Federal Rule of Evidence 613(b) provides as follows:

(b) Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

It can be seen from the text of Rule 613(b) that it in no way changes the case law that is cited above. In fact, Rule 613(b) lends further support to defendant's contentions. Rule 613(b) provides that evidence of prior inconsistent statements by a witness are not to be admitted unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon. In the case at bar, Mrs. Martin was questioned by the defense counsel concerning prior statements that she gave to Mrs. Catherine Harvey in which she stated that appellant did father the child, did abandon the child and that her husband did beat her up when he learned that appellant was the father of the child. Mrs. Martin

was given ample opportunity to explain or deny. Mrs. Martin chose to deny all of these statements. Likewise, the government's counsel was given adequate opportunity to question her on these issues. In fact, Rule 613(b) well might be re-stated in its corollary as follows:

Once the witness is afforded the opportunity to explain or deny the prior inconsistent statement and once the opposite party is afforded an opportunity to interrogate him thereof, the extrinsic evidence of the prior inconsistent statement is admissible.

Thus, it is clear from the cases and from the Federal Rules of Evidence that the trial court erroneously excluded independent evidence, in the form of the proffered testimony of Mrs. Catherine Harvey, that the chief prosecution witness had a substantial motive to testify falsely against appellant. Thus, appellant's conviction must be reversed.

UNITED STATES COURT OF APPEALS : SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff

against

RONALD WILLIAM HARVEY

Defendant

Index No.

Docket No. 76-1183

AFFIDAVIT OF SERVICE
~~EXXWAMX~~

STATE OF NEW YORK, COUNTY OF Erie

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Buffalo, New York

That on the 25th day of June 1976 deponent served the annexed Brief for the Appellant and Appendix for the Appellant on the U.S. Attorney's Office, Attention of Richard E. Mellenger, Asst. U.S. attorney(s) for United States of America in this action at United States Courthouse, 65 Court Street, Buffalo, NY the address designated by said attorney(s) for that purpose ~~by depositing the same in an official depository or by handing the same to the addressee or to his agent or attorney in the State of New York.~~

Sworn to before me

this 25th day of June 1976

Anne M. Srebro

Maureen E. O'Connor

The name signed must be printed beneath

Maureen E. O'Connor

ANNE M. SREBRO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

CONCLUSION

For the foregoing reasons, the judgment of conviction against the appellant should in all respects, be reversed.

DATED: Buffalo, New York
June 25, 1976

Respectfully submitted,

LATONA, WORTHINGTON, SREBRO
& NITTERAUER

By Anne M. Srebro
Attorneys for Appellant
Office and P.O. Address
120 Delaware Avenue
Suite 200
Buffalo, New York 14202